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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIANUS RENATUS MURILLO,

Defendant and Appellant.

H045029

(Monterey County

Super. Ct. No. SS151970)

Defendant appeals the denial of a resentencing petition under Penal Code section 1170.18, subdivision (a) relating to his violation of Vehicle Code section 10851 occurring one year after California's electorate created the resentencing mechanism with Proposition 47. The trial court denied the petition, reasoning that offenses under Vehicle Code section 10851 were not among those qualifying for relief under Proposition 47. That view has since been rejected by the California Supreme Court in *People v. Page* (2017) 3 Cal.5th 1175 (*Page*).

We will affirm the trial court's denial of defendant's petition for a different reason: Resentencing under Penal Code section 1170.18, subdivision (a) is available only to persons serving a sentence on November 5, 2014 for a qualifying conviction, not to persons who commit a qualifying offense after that date. But defendant is not without recourse. Having completed his sentence, he may file an application under Penal Code section 1170.18, subdivision (f) to have his elony conviction redesignated as a

misdemeanor. We will therefore affirm the trial court's order without prejudice to the filing of a redesignation application.

I. BACKGROUND

Defendant was charged with unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 1)¹ and receiving a stolen motor vehicle (Pen. Code, § 496d, subd. (a); count 2), both offenses alleged to have occurred on or about November 21, 2015. On December 15, 2015, defendant entered a no contest plea to count 1 conditioned upon receiving a "felony probation top." At the plea hearing, defendant agreed that the police report contained sufficient facts to support his plea and conviction. According to the probation officer's summary of that report, a Salinas Police Department patrol officer ran a license plate check on a parked 2000 Honda Accord in which defendant and a female companion were seated. After learning the vehicle had been reported stolen, the officer called for backup, and ultimately ordered defendant out of the driver's seat at gun point. When asked where he had stolen the car, defendant said " 'the village,' " later determined to have been from a shopping center in Carmel Valley. Consistent with the negotiated disposition, imposition of sentence was suspended, defendant was placed on formal probation for three years, and count 2 was dismissed. Defendant informed the probation officer he smoked methamphetamine six or seven times per year, and had been "in and out" of several self-referred mental health and drug treatment programs.

¹ Vehicle Code section 10851 prohibits any person from driving or taking a vehicle without the owner's consent, "with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle." (Veh. Code, § 10851, subd. (a).) Adhering to the statutory language, the criminal complaint alleged that defendant committed a felony offense by "unlawfully driv[ing] and tak[ing] a certain vehicle, to wit, [a] 2000 Honda Accord [], then and there the personal property of [vehicle owner] without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle."

Defendant admitted violating probation in April 2016 for methamphetamine use, and a second violation for methamphetamine use was alleged in February 2017. After the matter was stayed while competency issues were addressed, in July 2017 defendant admitted the second violation. While sentencing was pending, defendant filed a petition to recall his felony sentence and be resentenced for a misdemeanor under Penal Code section 1170.18, subdivision (a). Acknowledging the issue was under review in the California Supreme Court, defendant argued that his conviction should constitute misdemeanor petty theft under Penal Code section 490.2, which was added by Proposition 47 and generally defines misdemeanor or petty theft as “obtaining any property by theft where the value of the money, labor, real or personal property taken” is not more than \$950. (Pen. Code, § 490.2, subd. (a).) To establish that the value of the stolen car did not exceed \$950, defendant provided an estimated value of \$602 generated by Edmunds.com. The prosecution opposed granting the relief, arguing that the offense was categorically ineligible under Penal Code section 1170.18, and alternatively that defendant had not proven the value of the car by competent evidence.

The trial court denied the petition based on ineligibility, explaining that “the majority of ... districts have held that 10851s do not qualify for Prop 47 relief.” Defendant was sentenced to 16 months in county jail under Penal Code section 1170, subdivision (h), deemed served based on presentence custody credits.

II. DISCUSSION

Proposition 47, the Safe Neighborhoods and Schools Act of 2014, reclassified as misdemeanors certain theft offenses when the value of the property does not exceed \$950. (Pen. Code, § 496, as amended by Prop. 47, § 9, approved Nov. 4, 2014. Undesignated statutory references are to the Penal Code; undesignated subdivisions are to section 1170.18.) The initiative added new Penal Code section 490.2, classifying property obtained by theft valued at \$950 or less to be petty theft punished as a misdemeanor, absent disqualifying prior convictions. It also established a resentencing

procedure for persons serving felony sentences for the reclassified offenses at the time of Proposition 47's passage (*Page, supra*, 3 Cal.5th at p. 1179; § 1170.18, subds. (a)–(b)), as well as a redesignation procedure for persons having completed their sentences (§ 1170.18, subd. (f)).

As originally enacted, section 1170.18, subdivision (a) directed that “[a] person currently serving a sentence for a conviction ... of a felony or felonies who would have been guilty of a misdemeanor under the act that added this section [] had this act been in effect at the time of the offense may petition for a recall of sentence ... to request resentencing” from the trial court in accordance with the newly amended and added code sections. (Voter Information Guide, Gen. Elec. (Nov. 4, 2014), text of Prop. 47, § 14, pp. 73–74.) In 2016, the Legislature extended what had been a three-year deadline for seeking resentencing to November 4, 2022. (§ 1170.18, subd. (j); Stats. 2016, ch. 767, § 1, p. 5236.) In so doing, subdivision (a) was amended to provide that the resentencing procedure was available to persons “who, on November 5, 2014, [were] serving a sentence for a conviction” which was reclassified as a misdemeanor by Proposition 47. (§ 1170.18, subd. (a).)

In *Page*, issued shortly after defendant filed his appeal, the Supreme Court held that Proposition 47's new petty theft provision (§ 490.2) applies to theft offenses under Vehicle Code section 10851: “[O]btaining an automobile worth \$950 or less by theft constitutes petty theft under section 490.2, and is punishable only as a misdemeanor, regardless of the statutory section under which the theft was charged.” (*Page, supra*, 3 Cal.5th at p. 1187.) Vehicle Code section 10851 convictions are therefore not categorically ineligible for resentencing under section 1170.18. (*Page*, at p. 1189.)

In light of *Page*, the parties agree that at the time defendant committed the offense in 2015, vehicle theft was a misdemeanor if the vehicle's value was not more than \$950. But they disagree as to whether defendant's petition establishes a theft conviction and whether the car was valued at \$950 or less. Notwithstanding the evidentiary disputes,

defendant, who bears the burden of establishing his eligibility for resentencing (*Page*, *supra*, 3 Cal.5th at p. 1188), has failed to meet that burden. Defendant committed the offense in 2015, *after* Proposition 47 was enacted, but the qualifying language in section 1170.18 subdivision (a) limits resentencing to persons serving a sentence on Proposition 47's effective date. He asks us to follow *In re J.R.* (2018) 22 Cal.App.5th 805, review granted August 15, 2018, S249205.² In that case a different panel of this court reversed a juvenile court judgment sustaining the allegation of attempted unlawful driving or taking of a vehicle as a felony under Vehicle Code section 10851 in light of *Page*, and remanded the matter to allow the prosecution to attempt to prove a felony violation of Vehicle Code section 10851 or accept a reduction of the felony adjudication to a misdemeanor. (*In re J.R.*, at pp. 822–823.)

In re J.R. involved a contested jurisdictional hearing in which the juvenile court found a violation of Vehicle Code section 10851 and declared the offense a felony. (*In re J.R.*, *supra*, 22 Cal.App.5th at pp. 809, 812.) The parties agreed that the felony adjudication under Vehicle Code section 10851 could not stand in light of *Page*, which was decided during the pendency of that appeal, because it was not clear from the record whether the adjudication was theft-based or nontheft-based, and the prosecution had neither alleged nor proven that the value of the car exceeded \$950. (*In re J.R.*, at pp. 819–820.) In deciding whether double jeopardy would bar retrial, the *In re J.R.* court considered the evolution of Proposition 47's application to Vehicle Code section 10851 and the predictability of the decision in *Page* at the time the allegations were adjudicated. (*In re J.R.*, at pp. 821–822.) The court found retrial would not be barred because Vehicle Code section 10851 was not amended by Proposition 47, and as of the fall of 2015 no

² Review in *In re J.R.* was granted and proceedings deferred pending consideration of *People v. Bullard*, review granted January 17, 2017, S239488, a case addressing whether sections 490.2 and 1170.18 extend to convictions under Vehicle Code section 10851 for taking a vehicle *without* the intent to permanently deprive the owner of possession.

appellate court had applied it to Vehicle Code section 10851, subdivision (a), nor was its impact on that section obvious. (*In re J.R.*, at p. 822.)

In re J.R. does not directly support defendant's argument that he is eligible for relief under section 1170.18, subdivision (a), as the issue there was not eligibility for resentencing under section 1170.18, but rather the sufficiency of the evidence presented to support a felony violation of Vehicle Code section 10851. (*In re J.R.*, *supra*, 22 Cal.App.5th at p. 809.) But the double jeopardy discussion in *In re J.R.* does inform our view as to whether defendant, having completed his sentence, may be eligible to have his conviction redesignated as a misdemeanor under section 1170.18, subdivision (f). That subdivision provides: "A person who has completed his or her sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense, may file an application before the trial court that entered the judgment of conviction in his or her case to have the felony conviction or convictions designated as misdemeanors."

Like subdivision (a), subdivision (f) refers to persons "who would have been guilty of a misdemeanor ... had this act been in effect at the time of the offense." But subdivision (f) does not contain the restrictive reference to the date of Proposition 47's enactment contained in subdivision (a). Given the unsettled law before *Page*, and in light of Proposition 47's stated purpose and intent to "[r]equire misdemeanors instead of felonies for nonserious, non-violent crimes like petty theft" (Voter Information Guide, *supra*, text of Prop. 47, § 3, p. 70), and its express directive that the act "shall be liberally construed to effectuate its purposes" (*id.*, § 18, p. 74), we do not read subdivision (f) as limiting redesignation to theft convictions suffered under Vehicle Code section 10851 before the effective date of Proposition 47. Accordingly, we will affirm the trial court's order without prejudice to defendant applying for redesignation under subdivision (f). We take no position, however, as to whether a redesignation application should be granted.

In light of our conclusion that defendant is ineligible for resentencing (and because defendant may yet supply new or additional evidence in support of a redesignation application), it is unnecessary for us to address the sufficiency of the evidence he presented in support of his resentencing petition.

III. DISPOSITION

The order denying defendant's resentencing petition is affirmed without prejudice to defendant filing a redesignation application under Penal Code section 1170.18, subdivision (f).

Grover, J.

WE CONCUR:

Greenwood, P. J.

Bamattre-Manoukian, J.